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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-155

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, WASHINGTON PUBLIC INTEREST ORGANIZATION, *Respondents.*

MEMORANDUM REPLY BRIEF OF PETITIONER POTOMAC ELECTRIC POWER COMPANY

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Washington, D.C.
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Petitioner, Potomac Electric Power Company (Pepco), respectfully submits the following memorandum reply to the Brief in Opposition of the Washington Public Interest Organization (WPIO) filed on August 30, 1979.

OPINIONS BELOW

As noted by Respondent WPIO, the majority of the division of the District of Columbia Court of Appeals below, and the separate dissenting statement of Judge Nebeker, were appended to the Petition as Appendices D and G respectively. Subsequent to the filing of the Petition, the majority filed a "brief response" to the dissent on August 2, 1979, which is not yet reported and is reprinted *infra* at Appendix H.

ARGUMENT IN REPLY

A. The Democratic Central Committee Cases

Respondent WPIO persists in the argument that the *Democratic Central Committee* (DCC) cases[1] are controlling or persuasive precedent. This was WPIO's position before the Commission, which rejected it repeatedly (App. A at 29a-31a; App. B at 7b-8b; App. C at 2c). This was also WPIO's principal argument before the District of Columbia Court of Appeals, which again rejected it (App. D at 35d-41d).

In the DCC cases, the U.S. Court of Appeals' decision arose from the extraordinary circumstances occasioned by the highly profitable sale of abandoned streetcar facilities in the District of Columbia by the company which had been enfranchised by Congress to eliminate streetcars in the District. Under the Congressional franchise, the company acquired the transit properties for approximately $10,000,000 less than their depreciated original cost, and pursuant to a Congressional directive to the Commission to adopt operating-revenue-ratios rather than rate-base ratemaking.[2] The net effect of these special conditions, the DCC court found, was to create a capital gains windfall for the investors entirely at ratepayers' expense. So felt the

[1] *Democratic Central Committee* v. *WMATC* [*D.C.C.I.*], 485 F.2d 786 (DC Cir. 1973), *cert. denied*, 415 US 935 (1974); *Democratic Central Committee* v. *WMATC* [*D.C.C.II.*], 485 F.2d 886 (DC Cir. 1973), *cert. denied*, 415 US 935 (1974).

[2] *See Bebchick* v. *Public Utility Commission*, 318 F.2d 187 (DC Cir.), *cert. denied*, 373 US 913 (1963), for earlier details summarized in the DCC opinions which were the culmination of several years of litigation. *See also Bebchick* v. *WMATC*, 485 F.2d 858 (DC Cir., 1973) for the denouement.

Commission, in the instant proceeding, deeming the DCC cases to be inapposite, stating:

> "[W]e were and we remain convinced that the peculiar and unique facts involved in the *Democratic Central Committee* case [D.C.C.I.], which apparently were dispositive of the issue before the court in that case, are not present in the case here before us. As counsel for WPIO here represented to the [U.S. Supreme] Court[3] in the earlier case, 'The Court of Appeals holding was based upon the particular and unique facts . . . of this case . . . and is not a general holding relating to other kinds of assets or to other utilities.'" App. A at 30a.

And, the D.C. Court of Appeals agreed:

> "The windfall aspect—the peculiar equity—of the D.C. Transit situation is not apparent in the case before us; the *Democratic Central Committee* litigation is distinguishable as more egregious on the facts. Nor do other cases lend automatic support to petitioner's position . . . ." App. D at 37d.

It is not this part of the D.C. Court of Appeals' opinion that constitutes error.

B. Broadening the Issue On Review

Respondent, WPIO fails to address the constitutional issue raised by Pepco: That the D.C. Court of Appeals,

> ". . . without explanation, greatly broadened the issue on review in comparison with the issue on appeal, and in so doing required the Commission on remand unconstitutionally to consider non-

[3] Statement in opposition to petition for writ of certiorari, by D.C. Transit System, Inc., No. 73-971; certiorari denied, 415 U.S. 935 (February 19, 1974).

> jurisdictional revenue in setting the authorized rate of return from jurisdictional business." Petition at 13.

A remand for this purpose is inappropriate. The court's requirement that the Commission *consider* non-jurisdictional property is what is unconstitutional; we do not have to await the Commission's deliberations to see whether the *result* will be unconstitutional.

Respondent unwittingly illustrates the dilemma faced by the Commission on remand. The Commission was instructed by the court majority to augment the record with "substantial evidence" on the impact of non-utility gains on the rate of return (level of profit) authorized for District of Columbia utility operations. (App. D at 48d). The court dissent accurately labelled this "the non-issue," a matter raised by the majority *sua sponte*. (App. G at 10g.) Now the majority has recast its opinion to meet these objections (while ignoring its own original holding):

> "We adhere [sic] to our position 'that the overall rate of return is not at issue,' and that the specific question, therefore, 'is whether a portion of each company's prescribed returns should be deemed already paid' by the returns on the land transactions." App. H at 3h (citations omitted).

This is a clear declaration of the unconstitutional taking Pepco has argued against all along: *That profits outside the utility enterprise may not be conscripted to subsidize the regulated utility return.*

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

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APPENDIX

APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11780

WASHINGTON PUBLIC INTEREST ORGANIZATION, ET AL.,
PETITIONERS

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

WASHINGTON GAS LIGHT COMPANY, INTERVENOR.

No. 11786

PEOPLE'S COUNSEL, PETITIONER,

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

No. 12017

WASHINGTON PUBLIC INTEREST ORGANIZATION, ET AL.,
PETITIONERS

v.

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA, RESPONDENT,

POTOMAC ELECTRIC POWER COMPANY, INTERVENOR.

393 A.2d 71 (1978)

Filed August 2, 1979

[1801-A]

FERREN, *Associate Judge*, with whom NEWMAN, *Chief Judge*, joins: Judge Nebeker's dissent filed July 17, 1979, suggests a need for the following brief response.

1. As to scope of review, the majority opinion specifically acknowledges that review of Commission orders is governed by the criteria set forth in the organic act creating the Commission. D.C. Code 1973, §§ 11-722, 43-705, -706. 393 A.2d at 75, 77 n.5. This court has stated, however, that the Commission has the responsibility "to present its decisions in a manner amenable to judicial review," *Telephone Users Ass'n v. Public Service Comm'n*, D.C.App., 304 A.2d 293, 300 (1973), *cert. denied*, 415 U.S. 933, 934 (1974). In this connection, we have held that, absent findings which satisfy certain requirements of the District of Columbia Administrative Procedure Act, D.C. Code 1978 Supp., § 1-1509(e), the case or record must be remanded for further proceedings. *Id.* at 301; *see Chesapeake & Potomac Telephone Co. v. Public Service Comm'n*, D.C.App., 339 A.2d 710, 712-14 (1975). Otherwise, we shall not be able to meet our review responsibilities under §§ 43-705, -706. This court, sitting en banc, has acknowledged that the Commission, in this case has not yet met the "rational connection" requirement under § 1-1509(e). 393 A.2d at 85; *Potomac Electric Power Co. v. Public Service Comm'n*, D.C.App., —— A.2d —— (No. 10490, May 14, 1979, slip op. at 12 n.5.) (en banc). *See generally Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, D.C.App., —— A.2d —— (No. 12547, May 14, 1979 slip op. at 7-11, 14 & n.13).

2. The dissent criticizes the majority opinion for referring to "comparative stock prices" instead of "comparative rates of return" in discussing the Commission's use of a discounted cash flow (DCF) analysis. As used in this context, these respective terminologies reflect the

same concern: the minimum yield (reflected in the rate of return and/or the stock price) essential to continue attracting capital to the business, and thus to assure the company's financial integrity. Accordingly, the dissent does not affect the thrust of the majority's analysis and holding. On remand, the Commission has to decide (1) how, as a general rule, gains on land transactions shall be allocated, (2) what the impact in this case will be, if any, on the customer rate schedule, and (3) whether that impact will have any effect on the overall rate of return. It must also explain the reasoning behind each of these decisions.

We adhere to our position that "the overall rate of return is not directly at issue," 393 A.2d 79, and that the specific question, therefore, "is whether a portion of each company's prescribed returns should be deemed already paid" by returns on the land transactions. *Id.* This question cannot be answered, however, without deciding how gains on land which were formerly part of the rate base are related to the ratemaking process. 393 A.2d at 85 & n.16, 92-93.* If the Commission's decision on this question affects the overall rate of return, then that rate of return must be altered accordingly. We do not read the dissent to state otherwise.

In summary, because the Commission did not elaborate reasons for exempting the land gains from the ratemaking process, we must remand for clarification.

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* We do not understand the dissent's characterization of the overall rate of return as a "non-issue." Although, on one set of facts, the question of allocating gains on land transactions to the investors or the ratepayers will not necessarily affect the rate of return, it may be true, on another set of facts, that the allocation of such gains would have a depressing or enhancing effect on the company's ability to attract capital, thereby calling for an adjustment in the rate of return. *Id.* at 92.

see

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